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BEFORE THE  
Federal Communications Commission

WASHINGTON, D.C. 20554

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FEB 28 1995

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF SECRETARY

In the Matter of

Assessment and Collection  
of Regulatory Fees for  
Fiscal Year 1995

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) MD Docket No. 95-3  
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**REPLY COMMENTS OF AIRTOUCH PAGING**

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### Summary

AirTouch Paging is submitting reply comments respecting proposed changes in the schedule governing the assessment and collection of regulatory fees for fiscal year 1995.

The comments in the proceeding convincingly demonstrate that (a) Commercial Mobile Radio Service licensees suffer a disproportionate increase under the proposal because of the doubling of the base fee (from \$.06 to \$.13) and the change from a per subscriber to a per unit basis; (b) the Commission lacks the statutory authority to subject CMRS licensees to the proposed changes; (c) the dramatic increase will hurt the low margin paging business and not serve the public interest; and (d) the basis on which the Commission calculated the new fees must be shared with the public, in the interest of full disclosure and a complete record.

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FEDERAL COMMUNICATIONS COMMISSION  
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## Assessment and Collection of Regulatory Fees for Fiscal Year 1995

MD Docket No. 95-3

REPLY COMMENTS OF AIRTOUCH PAGING

In the Matter of Assessment and Collection of  
Regulatory Fees for Fiscal Year 1995, MD Docket  
No. 95-3, FCC 95-14, Released January 12, 1995  
(the "Notice").

## I. INTRODUCTION

1. Over 60 Commenters addressed various aspects of the Notice. These Commenters ranged from broadcasters,<sup>2/</sup> cable companies,<sup>3/</sup> facilities-based wireline telephone companies,<sup>4/</sup> resellers and alternative access providers,<sup>5/</sup> and wireless

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<sup>2/</sup> See, e.g., Comments of Beaverkettle Company, Bloomington Broadcasting, Broadcast Media Associates, Columbia Communications Corp., De La Hunt Broadcasting, Duhamel Broadcasting Enterprises, Fant Broadcasting, KGRR-FM, KUSK, Inc., Livingston Radio Company, Mid-State Television, Inc., Montana Broadcasters Association, the National Association of Broadcasters, Northern Broadcast, Inc., Radio 840, Inc., Washington Broadcasting Company, Withers Broadcasting Company of Texas, and WTIM-AM.

<sup>3/</sup> See, e.g., Comments of Cable Telecommunications Association, Cablevision Industries Corp., Cablevision Lightpath, Inc., National Cable Television Association ("NCTA"), and Wireless Cable Association International, Inc.

<sup>4/</sup> See, e.g., Comments of AT&T, Ameritech, Bell Atlantic, GTE, MCI, National Exchange Carriers Association, NYNEX, Southwestern Bell, Sprint Corporation, and U.S. West Communications.

<sup>5/</sup> See, e.g., Comments of Association for Local Telecommunications Services, Competitive Telecommunications Association, Hertz Technologies, LDDS Communications ("LDDS"), MFS Communications Company, and Telecommunications Resellers Association.

carriers.<sup>6/</sup> Not surprisingly, most Commenters oppose those changes in the fee structure that would increase the charges applicable to their particular industry. In the view of AirTouch Paging, the Commercial Mobile Radio Service ("CMRS") carriers make the strongest case that the proposed fee structure is unduly discriminatory and in conflict with statutory principles as applied to their industry.<sup>7/</sup>

## II. COMMERCIAL MOBILE RADIO SERVICE CARRIERS SUFFER DISPROPORTIONATE INCREASES

2. AirTouch Paging pointed out in its original comments that the proposed new fee structure would increase the company's fees 570% as a result of the "double whammy" resulting from increasing the base fee from \$.06 to \$.13 and changing the basis for the

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<sup>6/</sup> See, e.g., Comments of AirTouch Paging, Alltel Mobile Communications ("Alltel"), Cellular Telecommunications Industry Association ("CTIA"), Century Cellunet, Inc. ("Century"), Frontier Cellular Holding Inc. ("Frontier"), MobileMedia Communications ("MobileMedia"), and Personal Communications Industry Association ("PCIA").

<sup>7/</sup> See, e.g., Comments of AirTouch Paging at p. 2, Alltel at p. 2, Frontier at p. 2, Century at p. 2, MobileMedia at pp. 6-7, and PCIA at pp. 12-13.

fee calculation from subscribers to units.<sup>8/</sup>

Significantly, AirTouch Paging is not the only CMRS licensee reporting staggering increases. For instance, MobileMedia points out that its fees would also increase over 500%,<sup>9/</sup> AllTel indicates that its fees would increase over 200%,<sup>10/</sup> and Century claims its fees would increase over 320%.<sup>11/</sup>

3. While these dramatic increases are being reported by relatively large carriers (who tend to be the ones participating in rulemaking proceedings of this nature) there is good reason to believe that smaller CMRS carriers also will suffer disproportionate increases. The simple fact is that the low margin paging business is heavily geared to multiple unit accounts, which means that the number of units universally exceeds by a considerable margin the number of subscribers. The inevitable result of both increasing the base fee amount and the applicable fee

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<sup>8/</sup> See Comments of AirTouch Paging at p. 2.

<sup>9/</sup> See Comments of MobileMedia at p. 3.

<sup>10/</sup> See Comments of Alltel at p. 2.

<sup>11/</sup> See Comments of Century at p. 2.

unit is to subject CMRS carriers to an unusually large increase.

III. THE COMMISSION DOES NOT HAVE AUTHORITY  
TO CHANGE THE BASIS OF CALCULATING THE  
FEE FROM SUBSCRIBERS TO UNITS

4. AirTouch Paging concurs with those Commenters who argue that the Commission lacks the authority to change the basis for the fee calculation.<sup>12/</sup> The Omnibus Budget Reconciliation Act<sup>13/</sup> requires the Commission to make certain mandatory adjustments to the Schedule of Regulatory Fees in response to unexpected increases or decreases in the number of licensees or units subject to payment of the fees.<sup>14/</sup> The Commission is also granted the authority to make certain permissive changes to its Schedule to take into account "factors that are reasonably related to the benefits provided to the payor of the fee by the Commission's activities ..."<sup>15/</sup>

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<sup>12/</sup> See, e.g., Comments of Alltel at pp. 5-7, LDDS Communications, Inc. at p. 2, MobileMedia at pp. 4-5, and PCIA at pp. 5-8.

<sup>13/</sup> Public Law 103-317, 108 Stat. 1724 (approved August 24, 1994) ("Budget Act").

<sup>14/</sup> 47 U.S.C. Sec. 159(b)(2).

<sup>15/</sup> 47 U.S.C. Sec. 159(b)(1)(A).

Any permissive amendments ordered by the Commission must "reflect additions, deletions, or changes in the nature of its services as a consequence of Commission rulemaking proceedings or changes in law."<sup>16/</sup>

5. The Commission's proposal to change the basis of the CMRS regulatory fee from subscribers to units does not meet the standards for either mandatory or permissive changes. In fact, the Commission does not even try to tie the changes to these provisions of the statute. Instead, the Commission grounds its changes on the misguided conclusion that it would be "more equitable" to base fees on units rather than subscribers.<sup>17/</sup>

6. Unlike the Commission's broad authority with respect to other provisions of the Communications Act, the Commission may not base changes in regulatory fees on its own notions of what is equitable; it may only do what is permitted under the statute.<sup>18/</sup>

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<sup>16/</sup> 47 U.S.C. Sec. 159(b)(3).

<sup>17/</sup> Notice at ¶44.

<sup>18/</sup> The statute does not have a provision that allows the Commission to change fee structures based upon what is more equitable. Indeed, it is questionable whether fees based upon units is more  
(continued...)

Congress initially set the fees on the basis of subscribers and the Commission may not change that determination without a showing that the fundamental factors that led to the original fee structure have changed.<sup>18/</sup> The Commission has not made that showing. Indeed, AirTouch Paging believes the Commission could not make such a showing, because there have been no radical changes in the relationship of subscribers to units in the CMRS business between 1994 and 1995. And, most important, the regulation of wireless carriers has diminished in this timeframe.<sup>20/</sup> Therefore, the

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<sup>18/</sup> (...continued)

equitable when CMRS providers will experience increases in their fees far in excess of the increase mandated by Congress.

<sup>19/</sup> Indeed, at least one commenter has suggested that the Commission's fees are vulnerable to a Constitutional "takings" claim since the Commission's proposed fees do not appear to be a fair approximation of the costs of regulating the services. See Comments of NCTA at pp. 4-5 citing United States v. Sperry Corp., 493 U.S. 52, 60 (1989) (quoting Massachusetts v. United States, 435 U.S. 444, 463 n.19 (1978)); Webb's Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 155 (1980). See generally Dolan v. City of Tigard, 114 S.Ct. 2309 (1994).

<sup>20/</sup> See, e.g., Revision of Part 22 of the Commission's Rules Governing the Public Mobile Services, CC Docket No. 92-115, 9 FCC Rcd 6513 (1994) (relaxing filing requirements and streamlining application (continued...))

Commission's proposal to increase fees and change the basis of CMRS fees from subscribers to units is unsustainable.

IV. THE PROPOSAL TO CHANGE FROM  
SUBSCRIBERS TO UNITS DOES NOT  
SERVE THE PUBLIC INTEREST

7. Even if the Commission can find authority for the proposed change within the statute, the proposed fee structure nonetheless must be abandoned by the Commission because it does not serve the public interest. As the Commission pointed out in the Notice, Congress has mandated that the Commission recover for fiscal year 1995 \$116,400,000 in fees, an increase of 93% over the \$60,400,00 the Commission was authorized to recover for fiscal year 1994.<sup>21/</sup> The public interest does not support collecting a

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<sup>20/</sup> (...continued)

processing procedures as of January 1995); Regulatory Treatment of Mobile Services, GN Docket No. 93-252, 9 FCC Rcd 1411 Section III.E. (1994) (detariffing paging services; relaxing tariff requirements for CMRS, exempting CMRS from various common carrier obligations); Antenna Structure Clearance Procedure, WT Docket No. 95-5, FCC 95-16, released January 20, 1995 (proposed streamlining of tower clearance processes).

<sup>21/</sup> Notice at ¶2.

disproportionate share of the required amount from CMRS carriers.<sup>22/</sup>

8. One of the hallmarks of the paging industry has been a low average revenue per unit ("ARPU").<sup>23/</sup> The increase proposed by the Commission represents a substantial increase in the proportion of the regulatory fee to the ARPU.<sup>24/</sup> AirTouch Paging does not oppose paying its fair share of any increases mandated by Congress, but it should not be required to

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<sup>22/</sup> See, e.g., Comments of AirTouch Paging at p. 2, Alltel at p. 2, Frontier at p. 2, Century at p. 2, MobileMedia at pp. 6-7, and PCIA at pp. 12-13. AirTouch Paging also agrees with Frontier that requiring facilities-based carriers to suffer a fee and not resellers is anticompetitive. See Comments of Frontier at p. 2.

<sup>23/</sup> For example, the Paging Leadership Study shows that the average revenue per unit (ARPU) for paging is \$10.07 for 1993 and decreasing at an 8-9% rate per year. Assuming an 8% decline from 1993 to 1994, the industry average revenue per unit would be \$9.26. See The Paging Leadership Association, Paging Industry Benchmark Ratio Study, (Phase 10 Report, May 1994).

<sup>24/</sup> The current fee based on an assumption of 3 units per account would result in a fee of about .2% of the ARPU. The proposed fee would result in a fee of about 1% of the ARPU.

pay a larger portion of the increase than other parties receiving benefits from the Commission.<sup>25/</sup>

9. The substantial increase could also result in rate shock to CMRS paging subscribers. The Commission has a long standing policy against rate shock which could create substantial negative effects in the telecommunications marketplace, compromising the ability of carriers to provide service to customers as well as impeding competition.<sup>26/</sup> Given the substantial

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<sup>25/</sup> The regulatory fee assessed on paging is the same as that assessed on the Local Exchange Carriers (LECs). The ARPU, however, enjoyed by these two services is significantly different. For instance, LECs average four to five times the revenue per month per line than does paging per unit. It is simply inequitable to assess each of these two services the same fee, especially when LECs consume substantially more Commission resources.

<sup>26/</sup> See Investigation and Divestiture Related Tariffs, CC Docket No. 83-1145, FCC 84-524 (Released November 9, 1984), rev'd on other grounds, Western Union Telegraph Company v. FCC, 815 F.2d 1495 (D.C. Cir. 1987); See also Amendments of Part 69 of the Commission's Rules Relating to the Creation of Access Charge Supplements for Open Network Architecture, 4 FCC Rcd 3983 (1989).

increase in regulatory fees<sup>27/</sup>, customers of CMRS providers may suffer a substantial increase.<sup>28/</sup>

10. In addition, the Commission has sought to eliminate the differences between CMRS licensees and Part 90 licensees because it has recognized that these two services are competitive.<sup>29/</sup> The substantial rate increase proposed in the Notice will result, however, not in less but more disparity between these two services.<sup>30/</sup> For instance, CMRS providers will have

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<sup>27/</sup> AirTouch Paging already is facing a substantial increase in fees payable to the Commission because much of the spectrum the company will need to sustain and improve its business now is subject to auction. New wireless spectrum (e.g. narrowband PCS) already has been auctioned and AirTouch Paging has paid millions of dollars for licenses. The Commission also is proposing to subject old paging spectrum to auction whenever AirTouch Paging seeks a site more than 2 kilometers from an existing location. This too will result in fees to AirTouch Paging.

<sup>28/</sup> AirTouch does not know whether CMRS paging providers passed the costs of the fiscal year 1994 regulatory fees on to the subscribers, but given the substantial increase in fees, the CMRS providers may be forced to do so now. This would further exacerbate the rate shock suffered by CMRS paging customers.

<sup>29/</sup> Regulatory Treatment of Mobile Services, GN Docket No. 93-252, 9 FCC Rcd 1411, para 97 (1994).

<sup>30/</sup> The Budget Act prohibits the Commission from treating Part 90 paging licensees under the CMRS schedule until fiscal year 1997.

substantially higher costs to provide service over Part 90 licensees as a result of the proposed regulatory fee. These costs may translate into higher fees charged to CMRS subscribers. Any disparate increase in the fees would obviously not serve the public interest.

V. THE COMMISSION MUST SHARE ITS COST  
WORKSHEETS WITH THE PUBLIC TO ALLOW  
FULLY INFORMED COMMENTS

11. Several Commenters pointed out that the Commission had an obligation to share with the industry the data that the Commission used to derive its fees.<sup>31/</sup> AirTouch Paging agrees. The Commission under the Administrative Practices Act has an obligation to provide to the public the data used to develop the fee "in a form that allows for meaningful comment."<sup>32/</sup> At least one Commenter, PCIA, attempted to gain disclosure

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<sup>31/</sup> See, e.g., Comments of Comsat General Corporation at p. 4; see also Comments of PCIA at pp. 9-12.

<sup>32/</sup> Engine Manufacturers Ass'n v. EPA 20 F.3d 1177, 1181 (D.C. Cir. 1994).

of this information prior to the time for commenting on the fee proposal, but to no avail.<sup>33/</sup>

12. Without this information being available to the public, the Commission runs the risk that the whole fee structure could be overturned on appeal. There are numerous unanswered questions about the regulatory fees that only the data would answer. For instance, the Commission has provided no information on the assignment of costs to particular services<sup>34/</sup> and whether employees may have been doubled counted.<sup>35/</sup> AirTouch Paging believes that such a result would undermine the purposes behind charging the regulatory fee in the first place. AirTouch Paging, therefore,

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<sup>33/</sup> See Letter to Andrew S. Fishel, Managing Director, from Mark J. Golden (Feb. 6, 1995); see also Motion for Extension of Time, MD Docket 95-3 (filed Feb. 6, 1995) (denied).

<sup>34/</sup> This is of particular interest to CMRS paging providers because of the seemingly disparate impact of the new fees on CMRS paging services. See Comments of PCIA at p. 10.

<sup>35/</sup> This issue was raised by both CMRS providers and others. See Comments of PCIA at p. 11; see also Comments of LDDS at pp. 14-15. AirTouch Paging is concerned that some employee's time may have been counted once for application fee purposes and once for regulatory fee purposes. Given the substantial application fees paid by CMRS paging licensees (\$265 per transmitter), AirTouch Paging's concerns are well founded.

suggests that the Commission make available all of the data it used in proposing the new fee structure.

13. There have also been questions raised by the Commenters whether the regulatory fees will collect too much. For instance, Century points out that the number of subscribers used by the Commission to calculate the fees is grossly underestimated.<sup>36/</sup> The Commission used a unit count of 34 million subscribers for CMRS licensees.<sup>37/</sup> Industry sources, however suggest that the actual number of subscribers may be substantially greater. CTIA recently released a study that indicating that the number of subscribers for cellular services would reach 25 million by year end 1994.<sup>38/</sup> PCIA also recently released a study suggesting that paging subscribership would reach 24.5 million pagers by year end 1994.<sup>39/</sup> If these reports are correct, the Commission could collect in excess of \$2 million over the alleged costs to regulate the

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<sup>36/</sup> See Comments of Century at p. 3.

<sup>37/</sup> See Notice at Appendix G.

<sup>38/</sup> See RCR, Vol. 14 No. 2 at 1 (Jan. 30, 1995).

<sup>39/</sup> See PCIA 1995 PCS Technologies Market Demand Forecast Update at 2 (Jan. 30, 1995).

industry. If the Commission collects too much money, what will happen to the excess fees? Will they be returned to the industry groups that generated them?<sup>40/</sup>

14. The data, therefore, must be disclosed to the public in significantly greater detail than is provided in the Notice. Once the data is available, however, the public must have another opportunity to comment on the regulatory fee structure in light of the data. That is the only way the Commission's obligations under the Administrative Practices Act can be satisfied.

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<sup>40/</sup> Obviously, any amounts collected in excess of the mandated share of an industry should be returned pro rata to the payers. If the fee is not returned, then the argument the fee is in fact a tax gains substantial weight.

VI. Conclusion

15. AirTouch Paging, therefore, respectfully requests that the Commission decline to change the basis for calculating regulatory fees from subscribers to units and provide the data used to generate its fee proposals.

Respectfully submitted,

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February 28, 1995

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I, Carolyn M. Floyd, hereby certify that I have, this 28th day of February, 1995 caused copies of the foregoing **Reply Comments of AirTouch Paging** to be hand delivered or first-class mailed to the following:

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